Filed 7/16/20 P. v. Marquez CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FLAVIO HERNANDEZ MARQUEZ, Defendant and Appellant.	G057538 (Super. Ct. No. 18NF1512) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING; CHANGE IN JUDGMENT

It is hereby ordered that the opinion filed on June 29, 2020, in this appeal is modified as follows:

1. On the first page, directly beneath the caption, the second sentence in the first paragraph is modified to read:

> Affirmed in part, reversed in part, and judgment modified.

2. On page 2, change the last two sentences of the second full paragraph to read:

> These contentions are without merit, except for Marquez's sentencing challenge under newly-enacted legislation that requires striking his one-year prison prior, as we explain below.

3. On page 14, insert a new paragraph before the Disposition, as follows:

> Marquez is correct, as the Attorney General concedes, on the point he raises in supplemental briefing. The Legislature recently passed, and the Governor signed into law, Senate Bill No. 136 (2019-2020 Reg. Sess.) (SB 136), which amended section 667.5, subdivision (b), so that one-year prior prison term enhancements are limited to cases where the prior was for "a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code." (Stats. 2019, ch. 590; *People v. Winn (*2020) 44 Cal.App.5th 859, 872.) This change, effective January 1, 2020, is retroactive. (*Winn*, at p. 872.) The parties agree Mendez's prior prison term was not for a sexually violent offense, and therefore the prior prison enhancement allegation had no foundation once SB 136 became law. We therefore modify Marquez's sentence by striking the one-year enhancement.

4. On page 14, delete "The judgment is affirmed" from the Disposition, and insert the following new paragraph:

> We modify Marquez's sentence by striking the section 667.5, subdivision (b), one-year prior prison commitment enhancement. The trial court is directed to prepare an amended abstract of judgment reflecting this modification and forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

The petition for rehearing is denied. Because the modifications change the judgment, the time for finality of the opinion begins to run anew from the filing date of this order. (Cal. Rules of Court, rule 8.264(c)(2).)

GOETHALS, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.

Filed 6/29/20 P. v. Marquez CA4/3 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FLAVIO HERNANDEZ MARQUEZ, Defendant and Appellant.	G057538 (Super. Ct. No. 18NF1512) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard M. King and Lance Jensen, Judges. Affirmed.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Paul M.

Roadarmel, Jr. and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Flavio Hernandez Marquez of two counts of attempted murder (counts 1 and 2) and two counts of assault with a deadly weapon (counts 3 and 4). (Pen. Code, §§ 664, subd. (a)/187, subd. (a); 245, subd. (a)(1); all further statutory references are to this code.) Counts 1 and 2 involved victim Darline M., and counts 3 and 4, victim Giovanni V. The jury also found numerous penalty enhancement allegations to be true, including on count 1 that Marquez premeditated the attempted murder (§ 664, subd. (a)), on counts 1 and 2 that he personally used a knife (§§ 12022, subd. (b)(1); 1192.7), and on all four counts that he inflicted great bodily injury on the victims (§§ 12022.7, subd. (a); 1192.7; 667.5). In a bifurcated proceeding, the trial court found multiple prior conviction enhancement allegations to be true, including two prior strike convictions (e.g., §§ 667, subd. (d), (e)(2)(A), 1170.12, subds. (b), (c)(2)(A); 667, subd. (a)(1); 667.5, subds. (a), (b).) The court sentenced Marquez to consecutive 25-years-to-life terms on counts 1 and 2, which increased to a total term of 64-years-to-life with the various penalty and prior conviction enhancements, and the court stayed imposition of sentence on counts 3 and 4 under section 654.

Marquez contends the trial court erred in a pretrial ruling when it found two counts were not barred for having been twice dismissed because the prosecutor, invoking section 1387.1 demonstrated that a third filing was permitted due to excusable neglect in failing to locate victim Darline M. to testify. In the alternative, Marquez argues the prosecutor was required to pursue the two counts pursuant to section 871.5, which authorizes reinstatement—rather than refiling— of charges when the prosecutor demonstrates the magistrate legally erred in ordering a prior dismissal. Marquez also challenges the sufficiency of the evidence to support the twice-dismissed counts. As we explain, these contentions are without merit. We therefore affirm the judgment.

FACTUAL BACKGROUND

On September 15, 2016, Darline M. was walking with her friend Maria C. towards the Holiday Inn near the west entrance to Disneyland when she saw Marquez, whom she had known for years, approaching her on foot. Darline had been drinking. Marquez was wearing dark clothing and his face was obscured by a hood, but Darline recognized him by his walk and voice. As they approached the motel the lighting allowed her to see his face.

Darline had a "bad feeling" about encountering Marquez. He fell in step with her and Maria, walking in the same direction and conversing with Darline briefly. He followed her into the Holiday Inn driveway where he abruptly stabbed her in the neck.

A person staying at the motel found Darline on the ground in a pool of blood. She was unconscious, but still breathing. An officer arrived within 10 minutes. He found Darline was barely breathing, with a wound to her neck and a puncture wound on the left side of her chest. She was transported to a nearby hospital. The officer found no weapon at the scene.

Earlier that same evening, Giovanni had been walking past the Springhill Suites on Ball Road and recalled looking down at his phone. Giovanni did not remember what happened next, but thought someone possibly jumped out of the bushes and began attacking him. A sheriff's deputy from Oregon who was visiting Disneyland with his family found Giovanni on the ground covered in blood; there was blood coming from his shoulder. Giovanni was not responsive when the deputy tried to speak with him; the deputy observed multiple puncture holes in Giovanni's shirt and one in his pants. After an ambulance took Giovanni away, the deputy observed a trail of blood on Ball Road leading to the Springhill Suites.

The same doctor treated Darline and Giovanni at the hospital. Giovanni had six stab wounds primarily to the left side of his body, including to his biceps and elbow on his left arm, his left calf, and his upper back. Giovanni sustained a punctured

lung and an injury to his left arm which required surgery to transplant a nerve from his leg to his arm. Giovanni could not identify his attacker.

The doctor repaired an arterial bleed to the right side of Darline's neck. Officers questioned Darline at the hospital and she eventually told them Marquez stabbed her. She identified him in a photographic display, stating, "The person that did this to me is Flavio."

Two days after the stabbing, the police arrested Marquez at Energy Field, a park in Anaheim where investigators later tried unsuccessfully to find Darline.

Darline testified that at the time of the stabbing she was living on the streets, going from "motel to motel" or "couch to couch." A mother of five children, many grown, she was looking for a place to stay when Marquez stabbed her. Darline believed Marquez and Giovanni knew each other; Giovanni testified he knew Darline, but not Marquez.

Darline testified she was aware investigators were looking for her in May of 2018. She noted she was raised in a neighborhood where you did not speak to the police if you witnessed a crime, and said she had been incarcerated two or three times in her life. Among other efforts, searches for Darline by law enforcement of in-custody inmate locators and her other known prior residences proved unsuccessful as we discuss more fully below. Ultimately, deputies from the gang detail aided investigators in locating and serving Darline with a subpoena in August 2018. After she ignored the subpoena, she was arrested, placed on a material witness hold, and eventually she testified at trial.

DISCUSSION

1. *Section 1387.1*

Marquez moved pretrial to dismiss counts 2 and 4 because those charges involving victim Giovanni had been twice dismissed. The court denied the motion on grounds that a third refiling of the charges was permitted under section 1387.1, since a

prior dismissal resulted from excusable neglect when the prosecutor had been unable to locate Darline as a witness. Marquez contends the trial court erred by finding excusable neglect and a lack of bad faith on the prosecutor's part. We find no abuse of discretion in the court's ruling.

A. *Governing Law*

Section 1387.1, subdivision (a), provides, "Where an offense is a violent felony, as defined in [s]ection 667.5 and the prosecution has had two prior dismissals, as defined in [s]ection 1387, the people shall be permitted one additional opportunity to refile charges where either of the prior dismissals under [s]ection 1387 were due solely to excusable neglect. In no case shall the additional refiling of charges provided under this section be permitted where the conduct of the prosecution amounted to bad faith." This section provides an exception to the so-called two dismissal rule in section 1387 that generally bars a third filing of felony charges. (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1019, fn. 6; *People v. Superior Court (Martinez)* (1993) 19 Cal.App.4th 738, 743-744 (*Martinez*).)

The exception was "designed to save serious felony prosecutions from improvident loss." (*People v. Woods* (1993) 12 Cal.App.4th 1139, 1157 (*Woods*).) '"[E]xcusable neglect"' includes "error on the part of the . . . prosecution . . . ." (§ 1387.1, subd. (b).)

Gross neglect is not "excusable." Conduct qualifying for excuse under the statute is "'"neglect that might have been the act or omission of a reasonably prudent person under the same or similar circumstances."'" (*People v. Massey* (2000) 79 Cal.App.4th 204, 211 (*Massey*).) Such neglect may include failure to secure the presence of a witness at trial. (*People v. Mason* (2006) 140 Cal.App.4th 1190, 1195-1197.) The court must examine the nature of the mistake or neglect, including the prosecutor's diligence and stated reasons for the failure or omission. (*Woods, supra*, 12 Cal.App.4th at pp. 1149, 1156.)

Prosecutorial bad faith in refiling charges invalidates conduct that would otherwise constitute excusable neglect. (§ 1387.1, subd. (a); *Tapp v. Superior Court* (1989) 216 Cal.App.3d 1030, 1035.) The defendant bears the burden of proving bad faith and rebutting the presumption the prosecutor properly exercised his or her discretion to refile charges after failing to locate a witness. (*Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 741-742 (*Miller*).)

We review the trial court's ruling on a motion to set aside refiled charges under the deferential abuse of discretion standard. (*Miller, supra,* 101 Cal.App.4th at p. 745.) "The application of section 1387.1 is generally a discretionary determination for the judge which should be afforded great weight unless clear abuse of discretion is demonstrated." (*Massey*, *supra*, 79 Cal.App.4th at p. 211.)

B. *Procedural History*

Marquez contends the trial court could not reasonably find excusable neglect in the prosecutor's failure to locate Darline for trial. We briefly review the record before the trial court to put Marquez's challenge in context.

The felony charges arising from Marquez's alleged attack on both Darline and Giovanni in September 2016 were first filed by information that same month, but the case languished for reasons not explained in the record or by the parties.

In December 2017, clerical staff at the district attorney's (DA's) office made multiple unsuccessful attempts to contact Darline at the phone number she provided in police reports; the number "was not accepting calls." An investigator from the DA's office personally went to one of four addresses listed for her in police reports and law enforcement databases. The new tenant at that apartment did not know Darline. The investigator did not travel to her prior address in Henderson, Nevada, nor at that time to the other two addresses on file. He did however locate and speak with Maria C., who had been with Darline when she was stabbed. Maria stated she had not seen or heard from

Darline for a few months and did not know where she was. It does not appear that a trial date had been scheduled yet.

In February 2018, the investigator sent a text message to a phone number on record for Darline, but it yielded no response. In April 2018, a new deputy district attorney and a new investigator assumed responsibility for the case. They determined the Nevada address was Darline's "last known address," but found "shortly after looking into the matter," that the address was "not accurate." Renewed conversations with Maria C. and Giovanni yielded no new contact information.

A trial date was set for May 9, 2018; it was pushed to May 14 after Marquez's request for a brief continuance. On May 2, the DA investigator located two new potential addresses for Darline but neither address bore fruit. Phone calls and a voicemail to Darline's phone number of record and to a potential new phone number went unanswered. The investigator then enlisted the help of the Anaheim Police Department's (APD's) gang detail, which had initially investigated the case. But their efforts to aid "in . . . searching for [Darline] and making inquiries as to her location," which commenced no later than May 10, were similarly unsuccessful over the next two weeks.

Meanwhile, on May 14, the first of 10 days the case trailed for trial, the investigator visited first in the morning, then in the afternoon, and again in the evening an Anaheim address that Darline once gave as hers, but there was no one present until the next day. The resident who answered the door on May 15 did not know Darline and claimed to have been previously contacted by officers who had also been looking for her. It was another dead end.

On May 18, the investigator revisited the Anaheim address. This time, a woman named Cindy B., who was the mother of Darline's boyfriend and had custody of Darline's child, answered the door. The investigator requested that Cindy B. put Darline

in touch with him if she heard from her. Cindy B. explained she was not in contact with Darline, but she provided the investigator with a phone number.

The investigator called the number the next business day, May 21, and Darline answered. When he informed her she was needed in court, Darline told him "she didn't want anything to do with the case." The investigator and the prosecutor nevertheless seemed to hope Darline would appear at the courthouse as the case trailed through its final days from May 22 to May 24. The investigator "repeatedly and consistently" checked in-custody inmate locators and other law enforcement databases for updated contact information for Darline, without success. During the search period, the investigator also made "at least two trips" to a park in Anaheim that was mentioned in police reports as a place Darline frequented. He did not find her.

On May 24, responding to a final telephone call from the investigator, Darline answered by text message, stating, "I want nothing to do with [the] case. I don't know who did it." Unable to secure Darline's presence and "unwilling[] to proceed without a material witness," the prosecutor announced he was not ready for trial and made an oral motion for dismissal, which the court granted. (§ 1385.) As we discuss more fully below, the prosecutor refiled the charges the same day. The APD gang detail finally located Darline on the streets in August 2018 and served her with a subpoena, which she ignored. At the time of trial, she was on a material witness hold and testified concerning the refiled charges.

C. *Argument & Analysis*

Marquez contends the trial court abused its discretion in finding excusable neglect in the foregoing chronology because, in Marquez's view, "no serious effort [was] made to get Darline to court until the 11th hour, i.e., May 2018." We must view the record in the light most favorable to the trial court's ruling. (*Miller*, *supra*, 101 Cal.App.4th at p. 745.) Factually, Marquez is wrong to suggest no serious effort was

made to locate Darline before May. The prosecution intensified its efforts in May, but the District Attorney had been attempting to locate Darline for months.

In fact, knocking on the Anaheim address door *again* in May is what finally led to eventual phone contact with Darline, which is remarkable given that the investigator had tried that address back in December, only to be met by a new tenant who had no knowledge of Darline. It could reasonably be inferred from this record that the prosecution had been diligently seeking Darline at that address in December. Moreover, there was no evidence that Cindy B. lived at that address in December, nor that the investigator should have known she existed or to ask for her. The fact that a stone once turned over only later yielded a long-sought prize supports the conclusion that the initial search efforts were reasonable.

Marquez argues that "[a] diligent prosecutor would have recognized no later than December 2017, five or six months before trial, that he or she needed a concerted effort to locate the homeless and unwilling witness." Marquez may not rewrite the record, however, which apparently did not suggest at the outset that Darline would be an unwilling witness. Moreover, the record showed concerted efforts to locate her. There was no evidence Darline utilized homeless shelters, so the court could conclude the investigator's efforts reasonably focused on addresses and phone numbers she had previously provided, law enforcement databases, checking places she was known to frequent, and enlisting the aid of the APD gang detail, which eventually found her. We find no abuse of discretion in the court's diligence ruling.

Nor does the record show prosecutorial bad faith in refiling the charges. Bad faith may include "evidence of an intentional mishandling of the process to annoy or vex" the defendant. (*Miller*, *supra*, 101 Cal.App.4th at p. 745.) Nothing suggests the prosecution's inability to find Darline was a bad faith tactic to harass Marquez with refiled charges. The record reflects that the investigator genuinely could not find Darline, despite reasonable efforts.

Marquez focuses on the prosecutor's failure to immediately disclose to the defense Darline's stated reluctance to testify in her text message on May 24, and her claim in the text message that she could not identify Marquez ("I don't know who did it"). Marquez speculates that, "[c]onceivably this evidence may not have been shared at all but for the fact that the prosecution was required to show diligence in the [section] 1387.1 hearing, and the statement supported its motion." The trial court, however, found neither a violation of the prosecution's disclosure obligations nor bad faith. Marquez's bare speculation does not contradict that finding. The fact remained that the prosecutor was going to have to locate Darline for trial to proceed, and the court reasonably could conclude that refiling charges was not done in bad faith.

In light of the foregoing, the court did not abuse its discretion in finding that excusable neglect under section 1387.1 caused the first dismissal, thereby eventually permitting a third filing of the charges.

We now turn to that third filing, and in doing so, we include a brief procedural overview of the magistrate's dismissal of two counts in the second filing (on May 24, 2018—as noted above), which resulted in the prosecutor filing the third and final information.

2. *Section 871.5*

A. *Procedural Background*

After the prosecutor refiled the charges on May 24, 2018, the magistrate conducted a preliminary hearing on June 6, 2018. The magistrate concluded surveillance footage from local businesses adequately placed Marquez at or near the scene of Darline's stabbing and that, in conjunction with an officer's testimony at the preliminary hearing, the evidence was sufficient to hold Marquez to answer on those charges (counts 1 and 3). But the magistrate concluded other video footage insufficient to support counts 2 and 4 (regarding Giovanni) because of gaps in the footage and other

failings. The magistrate observed that, "at least from the Court's viewing," neither person the prosecutor surmised could be Marquez in the second batch of footage wore the same "white or light-colored shoes that Mr. Marquez appeared to have [on] in the Shell video" related to Darline's attack. The magistrate therefore found "insufficient evidence to hold the defendant to answer as to count 2 and count 4 as alleged in the felony complaint," and she dismissed those charges.[1] The prosecutor filed them a third time on June 12, 2018.

B. *Contentions, Law & Analysis*

Marquez contends that to file the felony charges concerning Giovanni a third time after two prior dismissals, the prosecutor was required to proceed under section 871.5. In essence, Marquez argues that as a prerequisite to a third filing authorized by section 1387.1 for excusable neglect, the prosecutor had to attack the magistrate's second dismissal as legally erroneous under section 871.5. Alternately, the prosecutor could attack and overturn under section 871.5 the trial court's first dismissal in order to refile the charges. We disagree.[2]

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[1] The magistrate did not expressly dismiss counts 2 and 4, but "[e]ven without a formal order of dismissal, the magistrate's decision not to hold the defendant to answer is the equivalent of a section 871 dismissal of the complaint." (*Martinez, supra*, 19 Cal.App.4th at p. 744.)

[2] Respondent contends Marquez forfeited his appellate challenge under section 871.5 because he did not raise it below, instead contesting the third refiling only on grounds that the prosecutor's actions leading to the first dismissal did not qualify as excusable neglect under section 1387.1. Marquez asserts his pretrial challenge to the third refiling adequately preserved his argument or, if it did not, he asserts in his reply brief that trial counsel's failure to mention section 871.5 constituted ineffective assistance of counsel (IAC). We will address his claim of error in the interest of judicial economy, to prevent unnecessary further briefing or a later habeas petition regarding IAC. (*People v. Williams* (2000) 78 Cal.App.4th 1118, 1126.)

Section 871.5 establishes a procedure to compel a magistrate to reinstate charges the magistrate erroneously dismissed. "The only ground for the motion shall be that, as a matter of law, the magistrate erroneously dismissed the action or a portion thereof." (§ 871.5, subd. (b).) The motion must be brought within 15 days of the magistrate's ruling (*id.*, subd. (a)), and the statute sets out a reinstatement procedure distinct from the ordinary filing of a felony information under section 739.

Specifically, section 871.5 states: "When an action is dismissed by a magistrate pursuant to Section 859b, 861, 871, 1008, 1381, 1381.5, 1385, 1387, or 1389 of this code . . . or a portion thereof is dismissed pursuant to those same sections *which may not be charged by information under Section 739*, the prosecutor may make a motion in the superior court within 15 days to compel the magistrate to reinstate the complaint or a portion thereof and to reinstate the custodial status of the defendant under the same terms and conditions as when the defendant last appeared before the magistrate." (*Id.*, subd. (a), italics added.)

We see no merit in Marquez's claim the prosecutor was required to proceed under section 871.5 for a third filing. By its terms, section 871.5 applies to *reinstatement* of an earlier complaint, not to refiling charges as expressly authorized by section 1387.1. Marquez misplaces reliance on *Ramos v. Superior Court* (1982) 32 Cal.3d 26, 36-37 (*Ramos*), which held in light of section 1387's two-dismissal rule that a prosecutor's remedy after a second dismissal for insufficient evidence is to challenge the dismissal under section 871.5. *Ramos*, however, predated the enactment of section 1387.1 by five years. (Stats. 1987, ch. 1211, § 47.5.) *Ramos* therefore does not preclude the third filing that section 1387.1 expressly allows as an exception to the two-dismissal rule.

Under section 1387.1, the prosecutor may file charges a third time when the second dismissal was the result of his or her excusable neglect in securing the presence of a witness at trial (*Miller*, *supra*, 101 Cal.App.4th at p. 742) or when, as here, the first dismissal is excused. (*Massey*, *supra*, 79 Cal.App.4th at p. 210.) There is no necessity as

in section 871.5 to demonstrate that the magistrate committed any error in the prior dismissal, let alone erred "as a matter of law." (§ 871.5, subd. (b).) Under the plain language of sections 871.5 and 1387.1, the former has no application to refiling charges under the latter. Marquez's challenge based on section 871.5 therefore fails.

3. *Sufficiency of the Evidence*

Marquez also challenges the sufficiency of the evidence to support the jury's conclusion on counts 2 and 4 that he attacked Giovanni. Our review of such challenges is limited to determining whether substantial evidence supports the jury's verdict. Substantial evidence consists of evidence that is reasonable, credible, and of solid value. (*People v. Elliot* (2005) 37 Cal.4th 453, 466.) We must view the evidence in the light most favorable to the judgment. (*Ibid*.) We therefore make all reasonable inferences in support of the judgment. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) It is the trier of fact's exclusive province to assess witness credibility and to weigh and resolve conflicts in the evidence; consequently, a defendant attacking the sufficiency of the evidence "bears an enormous burden." (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.) Marquez fails to meet that burden here.

Marquez argues the jury speculated that because he stabbed Darline he must have stabbed Giovanni. Direct evidence is not necessary to support a conviction, however. To the contrary, circumstantial evidence may suffice, and the reviewing court must accept logical inferences the jury could draw from the evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

Here, gas station surveillance footage showed a figure in dark clothing near the Springhill Suites where Giovanni was stabbed. Footage from a nearby motel, the Main Gate Inn, showed a figure in the same dark clothing, whom the manager of the motel identified as Marquez, walking toward a room at the motel. The footage then showed that figure, in the same clothing, leaving the room area and walking on Ball Road

behind a man who was hunched over on his phone. The two people then disappeared into the bushes and, 30 to 45 seconds later, the figure in dark clothing sprinted out of the bushes and fled. Holiday Inn surveillance footage next showed a figure the jury could infer was Marquez near that motel, reaching down and grabbing something, and then making a motion towards Darline's neck. Darline identified him as her attacker.

Marquez relies on the fact that the magistrate at the second preliminary hearing found the evidence insufficient on counts 2 and 4, but the manager of the Main Gate Inn who identified Marquez on the footage did not testify at that hearing, nor did Darline. The evidence presented to the jury, including reasonable inferences from the evidence, amply supports the jury's verdict.

DISPOSITION

The judgment is affirmed.

GOETHALS, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.